Supreme Court, U.S.
FILED
DEC 10 2001
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No. 01-678

In The

Supreme Court of the United States

MOTION PICTURE INDUSTRY PENSION AND HEALTH PLANS,

Petitioners,

v.

N.T. AUDIO VISUAL SUPPLY, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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20 pp

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent respectfully submits this Corporate Disclosure Statement.

Respondent N.T. Audio Visual Supply, Inc. is a privately held corporation. It has no parent corporation and no publically held company owns 10% or more of the corporate stock.

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BRIEF IN OPPOSITION

Respondent N.T. Audio Visual Supply, Inc. respectfully requests the petition for writ of certiorari sought in this matter be denied.

REASONS FOR DENYING THE WRIT

The petition comes before this Court not because of any new or conflicting statement of law having broad impact, but because of Petitioners' failure to develop sufficient evidence before filing their motion for summary judgment in the district court. The Ninth Circuit merely applied long held ERISA standards to the unusually meager facts Petitioners presented in support of liability, found them wanting, and reversed the grant of summary judgment.

Petitioners now predicate their request for review on three assertions, all of which are in error, and none of which are supported by their authorities, nor by the record.

First, Petitioners seek review of a holding that was not made. The Ninth Circuit did not hold, as Petitioners contend, that benefit plans have the burden of proving contributions are due "even when the failure of an employer to comply with its statutory duty to maintain records will make it impossible or impracticable for the plan to meet this burden." (Pet. at 2.) There was no issue raised below concerning the impossibility or impracticability of proving contributions were due, and none was considered in the decision. Rather, the Ninth Circuit held

that the Petitioners had failed to produce sufficient evidence to meet their threshold burden of proving that there had been some covered work performed for which benefits were not properly paid. (Pet. App. at 6a.)

Second, contrary to Petitioners' contention, the Ninth Circuit's holding in this case does not conflict with its previous holdings, nor with those of other circuits. It is in harmony with this Court's decision in *Anderson* and related ERISA cases. The applicable standards in those cases are clear. Employee benefit plans have the initial burden of proving there has been some covered work performed for which benefits were not properly paid. If the plans thus establish liability (the "fact of damage"), they may proceed to prove the extent of benefits due (the "amount of damage"). If the plans then demonstrate the employer's records are inadequate to allow the calculation of damages, the burden shifts to the employer to disprove damages, in whole or in part.

The "fact of damage" was not in dispute in any of the cases which Petitioners claim support their position. It was undisputed there had been some covered work for which benefits had not been paid. The issue was simply the amount of damages.

The record below, however, presented the Ninth Circuit with a different and unique set of facts. By their own admission, Petitioners could not prove the fact of damage. Unlike the plans and trusts in the authorities they cite, Petitioners obtained no employee affidavits, generated no favorable deposition testimony, secured no written stipulations and, rather than present testimony at trial, opted to proceed by summary judgment. Their

motion rested upon the declarations of their auditors who conceded they could only "presume" there was some covered work for which benefits were not paid. They had no substantial evidence to prove it.

Given that evidentiary void, the plans sought a new standard for ERISA cases. They argued that if the plans, as the moving party on a motion for summary judgment, simply "raise genuine questions" about the accuracy of the employer's records, that alone should cause the burden to shift to the employer to prove the absence of liability and the absence of damage. (Pet. at 6.) In short, they wish to skip that niggling first step, proving liability, and proceed directly to the second step, raising issues about damages. They seek this new and relaxed standard even where, as here, the failure to prove liability resulted either from the plans' own failure to investigate, or because there was, in fact, no breach of the collective bargaining agreement. Not only was the Ninth Circuit's holding correct, but Petitioners have offered nothing to suggest any other court would decide these facts differently.

Finally, while a court could at some time issue a decision which might properly generate the concerns for financial solvency of employee benefit plans expressed by the petition, this is surely not that decision. The court below simply declined to eviscerate the modest "fact of damage" standard of proof required of the Petitioners. There is no reason to believe the decision will somehow threaten the financial vitality of employee benefit plans.

ARGUMENT

I. NEITHER THE RECORD NOR THE DECISION BELOW RAISE THE QUESTION PRESENTED BY THE PETITION

On May 13, 1997, the Plans filed suit against N.T. Audio to recover employee benefits claimed due. The Plans asserted that for some eighteen different persons they claimed to be employees of N.T. Audio during the applicable audit period, N.T. Audio failed to pay some benefits.

The record is devoid of any evidence that the Plans, either before or after filing suit, interviewed or sought affidavits from those employees. After filing suit, they did not notice the deposition of any employee or other witness. There were three employee depositions noticed, all by N.T. Audio. In each, the deponent testified either that he did not perform any covered work for N.T. Audio during the audit period, or that to the extent he had, benefits had been fully reported and paid.

There was no evidence that any of the eighteen purported employees performed any covered work during the audit period for which benefits were improperly paid. Nonetheless, on December 15, 1997, the Petitioners plunged ahead with a motion for summary judgment. The motion was granted. This appeal followed.

On appeal, and unable to prove the fact of damage (Pet.App. at 7a), Petitioners argued that if they merely proved the Respondent's records were deficient, the burden then shifted to the Respondent to disprove not only damages, but liability itself. They claimed it was enough,

as the moving party on summary judgment, to "raise genuine issues" about the accuracy of the employer's records. (Pet. at 6.)

The best statement of the actual issue before the Ninth Circuit was its own.

> We must decide, in an action under the Employment Retirement Income Security Act ("ERISA"), whether trustees of employee benefit plans produced sufficient evidence of employer liability on summary judgment to shift the burden of production. (Pet. App. at 1a.)

Looking to *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) and *Brick Masons Pension Trust v. Industrial Fence & Supply, Inc.*, 839 F.2d 1333 (9th Cir. 1988), the Ninth Circuit said "once the Trustees show 1) that N.T. Audio failed to keep adequate records, and 2) that there exist some employees who (a) performed covered work that was (b) unreported to the trust funds, then the burden shifts to the (*sic*) N.T. Audio to show the extent of the unreported covered work for those employees." (Pet. App. at 5a.) Although the Ninth Circuit found the records inadequate (Pet. App. at 5a), it determined that because Petitioners failed to submit supporting employee testimony, and because their auditors appeared only to "presume," without any basis, payments made were for covered work, Petitioners failed to prove 2(a) and 2(b), "the fact of damage." (Pet. App. at 6a-7a.) The court reversed the summary judgment in favor of the Petitioners.

Notwithstanding the facts, issue and holding below, Petitioners find the question presented by this case to be whether employee benefit plans retain the burden of

proving employer contributions are due, even where the employer's deficient records make it impossible or impracticable to do so. (Pet. at (i).) There is nothing in the record, though, to support a claim it was impossible or impracticable to prove the fact of damage. Although Petitioners did argue below that the fact of damage could not be determined on the employer records alone, they never asserted, and have been cautious not to do so here, that it was impossible or impracticable to obtain such proof in this case. Having eschewed routine investigation and discovery, Petitioners can proffer no evidence of what was impossible or impracticable.

The question presented by this Petition was neither raised nor addressed below. It cannot be addressed upon this record, nor upon the decision in this case.

II. THE DECISION BELOW IS CONSISTENT WITH ALL PRIOR CIRCUIT COURT DECISIONS AND WITH THE DECISIONS OF THIS COURT

Petitioners must assert a basis for the grant of certiorari. Petitioners chose "conflict in the circuits." They should have selected more carefully.

The Ninth Circuit applied well established law to a different set of facts not before explored by the very authorities upon which the Petitioners rely. Petitioners, however, misinterpret those authorities, beginning with the decision by this Court in *Anderson*, and extending to *Brick Masons*. Petitioners erroneously say that "[i]n *Anderson* this Court held that where an employee *contends* that he or she was not properly compensated" under the Fair Labor Standards Act ("FLSA"), and the employer fails to

keep proper records, the burden shifts to the employer to proffer evidence of the amount of work performed. (Pet. at 7.) (Emphasis added.)

It has never been sufficient for the employee to merely "contend" he was improperly compensated. He must prove it. *Anderson* made this clear.

> [W]e hold that an employee has carried out his burden if he *proves that he has in fact performed work for which he was improperly compensated* and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. *Id.* at 687-688.[1] (Emphasis added.)

This misunderstanding of the Petitioners' initial burden permeates and poisons their analyses of all other authorities. Some forty years after *Anderson*, the Eleventh Circuit applied the reasoning of that FLSA case in an ERISA context in *Combs v. King*, 764 F.2d 818 (11th Cir. 1985). However, contrary to Petitioners' assertion, *Combs* does not, without more, stand for the proposition that "once a plan audit *raised a reasonable inference* that work

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[1] There is a discrepancy between the last lines of the quotation here, and what purports to be the same quotation in the Petition. (Pet. at 7.) The explanation is that Petitioners' quotation added, deleted, and modified three different words from the original. Those errors, however, are non-substantive and were obviously unintentional.

had been performed on which contributions were due to the plans," the burden shifted to the employer respecting the amount of work in question. (Pet. at 8.) (Emphasis added.)[2] Instead, *Combs* quotes and adopts the language of *Anderson* which precludes any burden-shifting until the employee " 'proves that he has in fact performed work for which he was improperly compensated. . . . ' " *Combs, supra,* at 826, citing *Anderson, supra,* at 687.

That precise language, requiring the Petitioners to first prove the fact of damage, was adopted and repeated as the standard by the Ninth Circuit in *Brick Masons. Brick Masons,* one of the cases Petitioners wish this Court to follow (Pet. at 8), itself made clear that where the evidence is insufficient to prove the fact of damage in the first instance, there can be no burden-shifting on the issue of damages. An employer's records notwithstanding, plans must prove liability.

> [O]nce the Trust Funds proved the fact of damage and [the employer's] failure to keep adequate records, the burden shifted to [the employer] to come forward with evidence of the extent of covered work performed by the . . . employees. *Brick Masons, supra,* at 1338-1339.

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[2] Petitioners' statement of the holding in *Combs* was actually part of an interpretation of *Combs* by *Brick Masons,* 839 F.2d at 1338. But even with that clarification, the statement is erroneous. *Brick Masons* never said the plans need only "raise a reasonable inference." It said they must "produce evidence raising genuine questions." *Id.* at 1338. And, of course, those questions have relevance only after the plans have proven the fact of damage. *Id.* at 1338-1339.

Where *Brick Masons* found that some of the evidence of covered work was too speculative, it disallowed any burden-shifting.

> This testimony fails to establish even the *fact* of damage; the Trust Funds are therefore not helped by the relaxed standard of proof in *Combs* and *Anderson*, which applies only to the proof of the *amount* of damage. *Id.* at 1339 n.4. (Emphasis in the original.)

The decision below, therefore, is in harmony with *Brick Masons*. As did *Brick Masons* with regard to some of the employee claims before it, the court here determined the Petitioners had not offered sufficient evidence to establish the fact of damage. Petitioners were not helped by the relaxed standard of proof respecting the amount of damages. (Pet. App. at 7a-8a.)

In a subsequent Ninth Circuit decision, *Operating Engineers Pension Trust v. B&E Backhoe*, 911 F.2d 1347 (9th Cir. 1990), certain trusts argued, not unlike the Petitioners here, that solely because the employer failed to keep records detailing all duties performed by the employees, and specifically because the employer failed to note when an employee did covered or uncovered work, the employer should be required to make contributions for all work performed. The court found this argument to be "based upon faulty logic and a flawed reading of *Brick Masons* . . . . " *Id.* at 1354. As acknowledged by the petition, the court then followed the *Brick Masons* analysis. (Pet. at 8.)

Petitioners contend *Michigan Laborers' Health Care Fund v. Grimaldi Concrete*, 30 F.3d 692 (6th Cir. 1994), is in conflict with the decision below. It is not. It, too, relies

upon the *Anderson, Combs, Brick Masons* and *Operating Engineers* continuum, applying burden-shifting on the issue of damages only after liability has been established. As with those cases, liability in *Grimaldi* was "certain" and no extensive analysis of it was required. The court recognized that "[i]n *Anderson*, the Supreme Court also emphasized that the *fact* of damage was certain, as in the present case. . . . " *Id.* at 697. (Emphasis in the original.)

In *Illinois Conference of Teamsters and Employers Welfare Fund v. Steve Gilbert Trucking*, 71 F.3d 1361 (7th Cir. 1995), after the burden shifted, an employer was able to blunt summary judgment on the issue of damages by use of affidavits and depositions raising triable issues of fact as to the amount of damages. *Id.* at 1367. Petitioners criticize the holding because it allowed an employer who failed to maintain adequate records to contend that contributions were not due. (Pet. at 9-10.) Those issues, of course, are unrelated to the issues here.

Steve Gilbert Trucking is relevant, though, in that it shows the Seventh Circuit is in lockstep with all other circuits in requiring trusts to first prove liability and deficient records before allowing any burden-shifting.

> *Brick Masons* and *Combs* held that if a trust fund has proved that the employer is liable for delinquent contributions and that the employer has failed to keep adequate records, the burden shifts to the employer to come forward with evidence that the fund's calculations of damages are not accurate. *Id.* at 1367.

All circuits weighing in on the showing required for shifting the burden of proof have used the same *Anderson*

standard in their analysis.[3] In each case, the court deemed the records to be insufficient. Yet, in each instance, the plaintiff, whether plans, or trusts, or employees, had no difficulty proving the fact of damage. *See, Anderson,* 328 U.S. at 687-688, 691-692 (work was performed for which employees had not been compensated); *Combs,* 764 F.2d at 819-820 (the fact of damage was certain); *Brick Masons,* 839 F.2d at 1338 (the fact of damage was certain); *Operating Engineers,* 911 F.2d at 1349-1350 (the fact of damage was certain); *Grimaldi,* 30 F.3d at 694 (parties stipulated the employees did some covered work and it was undisputed the employer made no contributions for it; the fact of damage was certain); *Steve Gilbert Trucking,* 71 F.3d at 1363-1364 (employees performed covered work, but the employer refused to make contribution payments; the fact of damage was certain). Moreover, that same standard for burden-shifting first annunciated in *Anderson* maintains its vibrancy not only in ERISA cases, but in FLSA cases as well. *See,* e.g., *Caro-Galvan v. Curtis Richardson, Inc.,* 993 F.2d 1500, 1514 (11th Cir. 1993); *Fegley v. Higgins,* 19 F.3d 1126, 1133 (6th Cir. 1994).

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[3] Petitioners find solace in *Stanton v. Larry Fowler Trucking,* 52 F.3d 723 (8th Cir. 1995). (Pet. at 9.) The case is inapposite. *Stanton* merely addresses the employer's record keeping requirements under the Consolidated Omnibus Budget Reconciliation Act and the penalty to be suffered if not maintained. It does not address the standard for burden-shifting in issue here.

There is no conflict between this decision and those of the other named circuits. None ever confronted a similar issue respecting the sufficiency of evidence to establish the fact of damage. Rather than having broad application, therefore, this decision will be limited to its facts. Benefit plans in the future will, as they have in the past, enlist the aid of employees and other witnesses to discover and present evidence supporting liability, where liability exists. The multiemployer employee benefit plans, therefore, even those national in scope, will not, as Petitioners argue, be made to operate under conflicting rules of law.

III. THE DECISION BELOW DOES NOT IMPOSE ANY NEW OR MORE COSTLY BURDEN UPON EMPLOYEE BENEFIT PLANS

A. This Decision Will Not Render Plans Unable to Prove Contributions Are Due

Petitioners have failed to demonstrate the Ninth Circuit created a new or more arduous standard for measuring the sufficiency of evidence in ERISA contribution claims on summary judgment. All the shouting and wailing aside, neither common experience nor the underlying facts of this case support the claim that proving the fact of damage could become "impossible or impracticable" because of this decision.

Petitioners can only raise the point hypothetically. They do not claim that in this particular case it was impossible or impracticable to prove liability. As a result, it is unlikely on the record this Court could reach either the substantive or policy issues raised. This case could

not be ripe for decision, if at all, unless upon remand Petitioners establish a record demonstrating the purported impossibility or impracticability of which they complain.

B. This Decision Will Not Cause Plans to Undertake Otherwise Unnecessary Litigation

Petitioners apparently now recognize meeting their burden of proof might require communications with the employees themselves. They say: "In the absence of records, that inquiry will likely involve interviews with employees and other employer personnel and, in some cases, preparing employee affidavits." (Pet. at 13-14.) It just might. In fact, it has. Audits and interviews have been the accepted method of proving the fact of damage in ERISA cases since *Combs* in 1985. No authority cited by Petitioners, however, and none known to Respondent, has held that such interviews and affidavits impose an undue burden upon the plans. So the Petitioners go further.

They argue that even where the requisite evidence can be obtained to prove the fact of damage, "the plan's claim can apparently be refuted by contrary – albeit undocumented – employer contentions," citing to "the Seventh Circuit's *Steve Gilbert* formulation." (Pet. at 14.) Even in the Seventh Circuit, that statement is only partly accurate. But here, *Steve Gilbert* and its progeny are strawmen. They have no relevance to this case. The *Steve Gilbert Trucking* holding related to the quantum of evidence necessary after the burden shifts on summary judgment. *Id.* at 1367. Though Respondent argued the *Steve*

Gilbert position below with respect to damages, it was never addressed by the court. Nor has that "formulation" been adopted by any other case in the Ninth Circuit. The holding is not relevant to any issue decided in this case and provides no support for review by this Court.

C. This Decision Will Not Precipitate Employer Abuses

Petitioners explain that if employers make no contributions, plan assets and employee accounts will be reduced. (Pet. at 15.) While the statement is mathematically unassailable, it does not explain how this case will discourage contributions, nor why this Court should accept this case for review. This decision provides no cover to employers who might intentionally seek to avoid their contractual and statutory obligations to employees. The severe financial penalties imposed by ERISA will continue to dissuade any clear-thinking employer from violating its mandates.

Whether before or after this decision, the relatively few employers who would consciously abuse their obligations to employees subject themselves, in addition to their own attorney fees and costs, to the payment of all unpaid contributions for covered work (and perhaps for uncovered work, too, if the employer cannot prove otherwise), prejudgment interest, an additional sum in an amount equal to the interest due, or the liquidated damages provided under the plan, whichever is greater, the

plan's attorney fees, the plan's audit and other costs, and other legal and equitable relief as the court deems appropriate. 29 U.S.C. § 1132(g)(2); *see Gould v. Lambert Excavating, Inc.*, 870 F.2d 1214, 1217 (7th Cir. 1989) (injunctive relief to compel employer compliance with contribution obligations); *Combs v. Ryan's Coal Co.*, 785 F.2d 970, 981-982 (11th Cir. 1986), *cert. denied*, 479 U.S. 853 (jail terms appropriate for contempt by corporate officers of the employer for wilful violation of an injunction).

There is no reason to believe this decision will somehow tempt employers to cease keeping records. Employee assistance in proving unpaid benefits has in the past been easily garnered. The employer is at risk in the absence of good records. If the employer cannot distinguish covered from uncovered work, the employer suffers by having to pay benefits for all time worked by the employee. All the cited ERISA cases, including this one, stand as warnings to employers that the failure to maintain adequate records and make timely contributions exposes them to extraordinary costs, fees and penalties, as well as to the payment of additional benefits which, but for the inadequacy of records, might otherwise not be required.

CONCLUSION

For all the stated reasons, the petition for writ of certiorari should be denied.

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